IN THE

Supreme Court

OF THE

UNITED STATES

OCTOBER TERM, 1922.

No. 177.

TAKUJI YAMASHITA and CHARLES HIO KONO, *Petitioners.*

against

J. GRANT HINKLE, as Secretary of State of the State of Washington, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF FOR RESPONDENT

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STATEMENT.

The statement contained in petitioners' brief correctly states the facts and is accepted by respondent.

ARGUMENT.

Petitioners have filed two briefs herein: (1) their original brief, and (2) a supplemental brief which consists of a copy of the brief of the late David L. Withington in the case of *United States v. Ozawa*, to be argued with the present action. In the first brief but one material contention is made, i. e., that section 2169 of the Revised Statutes is obscure and incapable of exact construction unless the phrase "free white persons" be construed as including all persons other than negroes, and that consequently the court should give to it this broad construction, notwithstanding the fact that since negroes are otherwise expressly included the effect of such a construction will be to make the section "as having no practical significance." The brief of Mr. Withington, on the other hand, relies upon the following general propositions: (1) that section 2169 does not modify the Act of June 29, 1906, (2) that in any event the section means free white persons as distinguished from persons of the black race, and therefore includes the Japanese, and (3) that in the alternative, the Japanese are of Caucasian rootstock and therefore free white persons within the contemplation of the statute. To this we may also add the subordinate and more or less irrelevant proposition that the Japanese are assimilable. It will thus be seen that the only point common to both briefs is the point that section 2169 means nothing since the passage of the

Acts of 1870 and 1875. We are therefore somewhat in doubt as to whether counsel for petitioners intends to urge the additional points made in the *Ozawa* brief. The fact that they have seen fit to expressly urge a point common to both briefs but have not referred to the other propositions would seem to justify that they have abandoned them. Since, however, they do not expressly repudiate those points and have brought them to the attention of this court, we feel compelled, at the risk of undue prolixity, to consider them.

I.

SECTION 2169 LIMITS AND MODIFIES THE ACT OF JUNE 29, 1906.

Approximately one-half of the *Ozawa* brief is devoted to the proposition that the Act of June 29, 1906, contains all the statutory law applicable to the naturalization of the Japanese, and is not controlled or modified by section 2169, but that that section, if it has any application at all, only applies to a few isolated sections of the Revised Statutes of 1873 which were not expressly repealed by the Act of 1906. In effect, this is but an indirect way of contending that section 2169 has been repealed by implication, although an express statement to that effect is carefully avoided.

The Act of July 14, 1870, (16 Stat. 254) provided "that the naturalization laws are hereby ex-

tended to aliens of African nativity and to persons of African descent." The Federal Statutes were codified in 1873 and in this codification the phrase "being a free white person" was dropped out of the first section in Title 30 relating to the naturalization of aliens, and a section numbered 2169 was inserted, which read:

"The provisions of this title shall apply to aliens of African nativity and to persons of African descent."

The Act of February 18, 1875, to correct errors and supply omissions in the Revised Statutes (18 Stat. 316), amended section 2169 to read:

"The provisions of this title shall apply to aliens, being free white persons, and to aliens of African nativity and to persons of African descent."

This is the form in which it now appears in the Revised Statutes.

The Act of June 29, 1906 (34 Stat., Part I, p. 596) consists of 31 sections. Sections 1 to 14, inclusive, create a Bureau of Immigration and Naturalization and deal with the courts and procedure by which naturalization may be effectuated. Sections 16 to 25 define certain crimes in connection therewith. Section 27 prescribes forms to be used. Section 29 makes an appropriation, and section 30 provides for the naturalization of all persons not citizens who owe permanent allegiance to the United States. Section 31 declares when the act shall take effect. Section 26 of the act expressly repeals sec-

tions 2165, 2167, 2168 and 2173 of the Revised Statutes, and section 39 of the Act of March 3, 1903 (32 Stat. 1213) but makes no mention of section 2169.

We shall consider this question (1) as an original proposition, (2) viewed from the standpoint of legislative history, (3) as construed by the executive department of the Government, and (4) as considered by the lower Federal courts.

1. As an Original Proposition.

It will be observed that the repealing section in the Act of 1906, although it expressly repeals sections which precede section 2169 in the Revised Statutes, makes no mention of that section. It is fundamental that statutes must, if possible, be given a consistent construction, and that repeals by implication are not favored. It would seem that the application of these rules must compel the conclusion that the Act of 1906 is limited by section 2169. The *Ozawa* brief, beginning upon page 11, attempts to avoid the obvious application of these rules of construction by contending that section 2169 is applicable only to those sections of the Revised Code of 1873 left unrepealed by the Act of 1906. As is pointed out, however, the only sections of that act which are now of any practical force are sections 2166, 2172 and 2174, referring to the naturalization of soldiers and sailors, seamen and minor children. The effect of the contention is to impose a racial limitation upon these special classes who at the same time receive special consideration in

other respects when there is no such limitation imposed upon ordinary alien applicants. Such a construction would be without reason and we think must be rejected.

The *Ozawa* brief emphasizes the proposition that section 2169 is an enlarging and not a restrictive clause (brief, p. 13). This is clearly incorrect, because if this were so, there would be no necessity for section 2169, since the right of negroes to be naturalized under such construction would have been deemed to have been covered by section 2165.

Even if this were true, however, the effect would not be different unless section 2169 be rejected as mere legislative surplusage, because unless this is done, the phrase "free white persons," in the section, must be taken as explanatory of the word "alien" in section 2165, which reads:

"An alien may be admitted to become a citizen of the United States in the following manner, and not otherwise."

It therefore appears that even though we consider the section as an enlarging clause, it must have been passed with some purpose in view, and that only purpose would be that without it aliens other than those of the white race would not be included, which would lead to the same result as though the section were deemed technically restrictive.

The better view, however, is that since section 2169 is subsequent to section 2165, it was passed for

the purpose of restricting the word "alien" as used in the former section.

We see no merit in the point that the passage of the Chinese Exclusion Act of 1882 indicates a contrary legislative intent (*Ozawa* brief, p. 14). The general naturalization act as amended classified applicants according to color, while the Chinese Exclusion Act made a classification based upon nationality. The fact that the first act also included the other is not material. The only deduction to be drawn from the Act of 1882 is that Congress, in so far as the Chinese were concerned, was not content to leave the question dependent upon a judicial determination of a question of fact, possibly based on ethnological grounds.

The contention is also made that the effect of the words "provisions of this title" in section 2169 is to make the section inapplicable to the Act of 1906 (*Ozawa* brief, p. 12). Title XXX, which is referred to, included all the laws relating to the naturalization of aliens. The act of 1906 with some three or four exceptions, including section 2169, repealed these sections and substituted other provisions upon the same subject, but did not repeal section 2169. The word "title," was simply used in the original revision for purposes of convenience and was not used in the section as originally enacted (16 Stat. 254). As used in the revision of 1873 it referred to all existing laws with respect to naturalization, and when Congress

failed to repeal the section while at the same time it substantially repealed the remainder of the title, the only reasonable construction is to suppose that it intended the substitute act to be subject to the same limitations as was the original measure.

Pages 17 to 26, inclusive, of the *Ozawa* brief, are devoted to a discussion of the trend of legislation with respect to immigration since 1798. It is said that because Congress has never, except in the case of the Chinese, barred immigrants for racial reasons alone, then therefore the same liberality ought to be announced with respect to naturalization, even if that process requires the repeal of a statute by judicial decree. We are unable to appreciate the logic of this argument. The tolerated presence of an alien race within our borders, encouraged throughout our early history for economic reasons, is quite a different thing than the exercise of those rights which appertain to political equality by such aliens. The requirements with respect to naturalization have always been more drastic than those governing immigration for reasons which are quite obvious. There is nothing in the immigration statutes which aids in the construction of section 2169, and we are not aware of any legal principle which can make them applicable. The question of whether the same liberality ought to obtain in both cases is, of course, legislative, and not judicial.

Beginning upon page 23 of the *Ozawa* brief, attention is directed to the fact that the Immigration

Act of February 5, 1917, as it originally came from the House, excluded, subject to existing treaties, "Hindoos and persons who cannot become eligible, under existing law, to become citizens of the United States by naturalization," and to the further fact that this clause in deference to the protest of the Japanese Government, was stricken from the bill as finally enacted. We can see nothing in this fact which supports the proposition for which it is advanced. The very fact that the act as originally presented seemed to refer to existing racial barriers, amounts to a recognition by the framers of the act, at least, that section 2169 was then in force, notwithstanding the Act of 1906. It is also quite reasonable to conclude that the Japanese Government recognized the fact that under the existing laws the Japanese were not eligible to naturalization, and that Congress, by striking the clause objected to, was of the same opinion. Otherwise, there would have been no occasion for the protest and no necessity for the amendment of the act. This seems to have been the opinion of the senators who participated in the debate, as is shown by the quotations set forth upon pages 25 and 26 of the *Ozawa* brief.

The suggestion made upon page 27 of that brief that a contrary construction would in some way violate the treaties of 1895 and 1911 with Japan is too obscure for us to comprehend. Neither of these treaties refer in any way to the matter of naturaliza-

tion, and in so far as we have been able to ascertain, the Japanese Government, officially at least, has never made any such contention, although the Federal courts have uniformly refused to naturalize Japanese since the statute was first enacted. The favored nation clause in these treaties, even if applicable, would be immaterial, because naturalization has never been regulated by treaties made with foreign countries.

Beginning upon page 28 of the *Ozawa* brief, reference is also made to the Act of May 9, 1918 (40 Stat. 542), which amends the Act of June 29, 1906, in some respects. The only reference made in this act to that section is found in section 2, which provides:

"That all Acts or parts of Acts inconsistent with or repugnant to the provisions of this Act are hereby repealed; but nothing in this Act shall repeal or in any way enlarge section twenty-one hundred and sixty-nine of the Revised Statutes, except as specified in the seventh subdivision of this Act and under the limitation therein defined."

Since this act was amendatory to the Act of 1906, it seems to constitute a clear legislative recognition of the fact that the latter act is limited by section 2169; otherwise, there would be no meaning to the reference. The obscurity which the *Ozawa* brief appears to find in the clause "except as specified in the seventh subdivision of this Act and under the limitations therein defined" is not apparent to us. The Act of 1918 adds seven new subdivisions to section

4 of the Act of June 29, 1906, numbered from 7 to 13. The 7th subdivision to section 4 as thus amended, provides for the naturalization of certain persons in the military service. The saving clause in the repealing section, *supra,* obviously refers to this subdivision and was inserted to meet a possible contention that the effect of the subdivision was to permit the naturalization of persons other than free white persons and negroes, who were not named specifically by reference to their nationality in the amendatory statute. The section is perhaps subject to some technical criticism with respect to its form, but the legislative intent seems to be quite apparent. The following cases reach this conclusion:

In re Para, 269 Fed. 643;
In re En Sk Song, 271 Fed. 23;
Petition of Easurk Emsen Charr, 273 Fed. 207.

This seems also to have been the view of the House Committee on the Revision of Laws of the 67th Congress, First Session. This committee recommended the passage of H. R. No. 12, which was a revision of the laws of the United States, and which passed the House on May 16, 1921. Section 37 of this revision is a re-enactment of the repealing clause in the Act of 1918 except that it strikes the words "of this act" and inserts "of section 3675 of the Code of the Laws of the United States." Section 3675 is a copy of section 4 of the Act of 1906, as amended by

the Act of 1918, so that it is apparent that the codifiers had no doubt but that the reference to the seventh subdivision of this act was a reference to the seventh subdivision of section 4, as amended.

Whatever, therefore, may have been the original ambiguity in the Act of 1906, Congress, by the passage of the Act of 1918, has conclusively resolved that doubt against petitioners, because, when it modified the naturalization requirements for aliens in the military service, it expressly required that its action in that regard should not be regarded a repeal or enlargement of section 2169. This is a distinct recognition not only of the fact that section 2169 was still in existence, but also of the further and determining fact that it was not restricted to Title XXX of the original act, but operated as a limitation upon the Naturalization Act of 1906.

2. Legislative History.

Beginning upon page 16 of the *Ozawa* brief reference is made to the fact that in 1905 President Roosevelt recommended to Congress the revision of our naturalization laws and that in dealing with the different subject of immigration recommended that religious and racial differences be not made the basis of exclusion. From this it is concluded that the President meant the same remarks to apply to naturalization legislation, and a secondary implied conclusion is therefore drawn that the Act of 1906 was passed with the same understanding. A reference

to the legislative history of the act will show the contrary to be the fact. The Act of 1906 was originally introduced in the House of Representatives as H. R. No. 15442. It was drawn by a sub-committee of the House Committee on Immigration and Naturalization, and its passage was unanimously recommended by the committee (House Rep. 1789, House Reports, Vol. I., Nos. 2-2656, 59th Congress 1st Session). This report, after relating the history of the legislation of the bill, continues:

"Your committee has not sought to make any radical changes in the principles of existing law governing naturalization, except in two particulars. It is the opinion of your committee that the frauds and crimes which have been committed in regard to naturalization have resulted more from the lack of any uniform system of procedure in such matters than from any radical defect in the fundamental principles of existing law governing in such cases. The two changes which the committee has recommended in the principles controlling in naturalization matters, and which are embodied in the bill submitted herewith, are as follows:

"First. The requirement that before an alien can be naturalized he must be able to write either in his own language or in the English language, and read, speak, and understand the English language; and

"Second. That the alien must intend to reside permanently in the United States before he shall be entitled to naturalization."

The report then analyzes the bill section by section. Referring to the repealing section, which subsequently became section 26, the committee said:

"Section 28 provides for the repeal of certain sections of existing law, the provisions of which have been embodied in the bill submitted herewith, except in two cases, and in those your committee believes that the sections are no longer necessary."

The report then concludes by submitting as an appendix copies of sections "which are proposed to be repealed." These sections consist of sections 2165, 2167, 2168, 2173 and section 39 of chapter 1012, U. S. Statutes of 1903. When the bill came before the House, the House resolved itself into a committee of the whole and Representative Bonynge of the Naturalization committee thus explained the bill:

"I think, perhaps, all members of the committee are fully convinced that the naturalization laws need revision and amendment. We have at the present time, with only a few slight amendments, naturalization laws as they were written by James Madison in 1795. Under the Constitution Congress is authorized to establish a uniform rule of naturalization. The naturalization laws at the present time do not prescribe a uniform system of naturalization nor establish any code of procedure in such cases. * * * The bill which we present today *does not change the fundamental law* in reference to naturalization except in two particulars, to which I will address myself a little later, but it does provide for a general and uniform system of naturalization to be enforced throughout the United States. * * *

"The bill that is presented today undertakes to correct the abuses that have grown up under our lax and careless system of naturalization, or perhaps I ought to say that have grown up because we have no system of naturalization which is uniform throughout the United States. * * *

"Perhaps I can not do better than to give a general outline of the provisions of the bill. As I said a few moments ago, it does not seek to change the fundamental principles that have governed in naturalization cases from the foundation of the government, except in two particulars. Those two particulars, Mr. Chairman, are, first, that before an alien can become naturalized, if this bill shall be enacted into a law, it will be necessary that he shall satisfy the court that he is able to write either in his own language or in the English language, and able to read, speak, and understand the English language. That is a new qualification required of the alien for naturalization." (Italics ours)

(Cong. Record, Vol. 40, p. 3640.)

"The other additional qualification that is required from the alien is that he shall in his petition for naturalization declare that it is his intention to reside permanently in the United States. * * * The rest of the bill, Mr. Chairman, is in effect either administrative or *provides a code of procedure,* stating the method which an alien shall adopt to become naturalized." (Italics ours)

(Ibid., p. 3643).

It was thereafter debated and amended in the House (40 Cong. Rec., pp. 7033, 7761, 7777 and 7869) and was passed as amended. Upon its arrival in the Senate, it was referred to the Senate Committee, (ibid., p. 7913) and was reported back with certain amendments (ibid., p. 9009). The House at first refused to accede to the Senate amendments (ibid., 9381-9407), whereupon a joint committee was appointed, these differences reconciled (ibid., 9505, 9576 and 9691) and the bill finally passed (ibid., 9680-9777).

It is unnecessary to quote from the various debates. It was thoroughly considered in both houses, section by section, and the debate was unusually exhaustive. It seems indisputable that the original statement of the committee that the only changes in the fundamental law were with regard to educational qualifications seems to have been accepted without question by everybody. It is unthinkable that the Western members of Congress would have permitted such a far-reaching piece of legislation to pass, at least without debate, and when to the silence of the members is added the assurance of the committee that no such change was contemplated, the conclusion is impelling that Congress intended the act to be subject to section 2169.

Further support for this conclusion is likewise found in H. R. No. 12, which is a compilation of the Laws of the United States up to March 4, 1919, which compilation was prepared by the House Committee upon the Revision of Laws, and passed by the House of Representatives May 16, 1921. (61 Cong. Record, 67th Cong., 1st Session, 87-14-77). This compilation groups all the existing laws relating to immigration and naturalization under a single chapter known as "Title 23". Section 3689 of the compilation is a reenactment of section 2169, so that it reads as follows:

"The provisions of this chapter shall apply to aliens, being free white persons, and to aliens of African nativity, and to persons of African descent."

A reference to the Congressional Record, before cited, will show that this compilation was the result of several years of very careful work upon the part of the committee. The compilation as finally presented to Congress shows that it was the opinion of the committee that section 2169 modifies the Act of 1906, since the explanation of the bill made to Congress shows that it did not purport to contain any new legislation, but was only intended as an orderly arrangement of the statutes existing upon March 4, 1919.

3. Executive Construction.

The departments of the Federal Government charged with the handling of naturalization matters have uniformly given effect to section 2169 subsequent to 1906, as is evidenced by the reports of the Division of Naturalization, afterwards the Bureau of Naturalization.

In the report of the Department of Commerce and Labor for 1907, page 198, it is said:

"Some (courts) have apparently construed section 2169 of the revised statutes to mean that only Chinese or 'Mongolians' are excluded from naturalization, and that all other races are eligible."

Report for 1908, page 294:

"Section 2169 of the Revised Statutes forbade the naturalization of all aliens who are not 'white persons or persons of African nativity or African descent,' and is still operative."

At page 295, see tabulation showing three suits pending to cancel certificates as having been issued contrary to R. S. 2169.

Report for 1909, page 287, shows that two certificates were cancelled that year for violation of R. S. 2169. At pages 300, 301 and 302, report shows twenty-one persons were denied citizenship "because they were not white persons in the sense of those words in section 2169 of the Revised Statutes." Report does not show to what races these twenty-one belonged. Four were denied admission in New York, six in North Dakota, eleven in Washington.

Report for 1910, at pages 352-353:

"Moreover, in some places the view is apparently held that if the negroes could justly be naturalized en masse it is both useless and inconsistent to be critical in bestowing a like status on the persons of any other races of mankind who desire it."

Pages 363-364 show that four were denied certificates under Revised Statutes, 2169, while at page 368, report shows one certificate was cancelled under same section.

Report for 1912, at page 381:

"The present naturalization law vindicates the wisdom of 'the fathers,' for after a most unusual study and consideration, and with the benefit of a century of actual experience, it embodies the qualifications for naturalization that they had originally considered essential."

In 1913, the separate Department of Labor was created, and the Division of Naturalization changed

to the Bureau of Naturalization. Report of Department of Labor for 1913, at pages 362-363, shows four petitions were denied under Revised Statute 2169: One in Michigan, one in Minnesota, one in Montana, one in New Jersey. At page 370:

"Besides these known reasons for refusing to accept and file a petition, there are many others which raise a doubt in the clerk's mind; but in such cases, he can only express his doubt to the applicant, leaving it to the latter to assume the chance under existing conditions of making a petition which may be denied by the court. As an illustration of such case, there may be given, say, the application of a Tibetan, of a Hindu, of a Malay. To the eye of a clerk such applicant may appear to be neither a white person nor an alien of African origin, to whom alone the privilege of becoming naturalized is confined by section 2169, Revised Statutes. As he cannot anticipate the action of the court in such a case, there remains nothing for him to do beyond explaining to the applicant the grounds of his doubt, and accepting the petition, if the applicant is insistent."

Report for 1914, at pages 541 and 542, shows three persons were denied naturalization under Revised Statutes, 2169: Two in South Carolina and one in Nebraska. At page 543, report says:

"Attention is particularly drawn to the last item in the first of the two foregoing groups of denials. It is in effect a statement from the judges of the naturalization courts of the United States, state and federal, that with the exception of two cases in South Carolina and one case in Nebraska not one of the 118,572 petitioners for naturalization was other than a 'free white person or person of African nativity or an alien of African descent,' *section 2169 of the*

United States Revised Statutes excluding all other aliens from the privilege of becoming citizens by court process. The statement is merely adverted to here as one of natural interest in view of the fact that our alien population is composed of elements coming from practically every race and every nationality of the habitable globe." (Italics ours).

Report for 1915, at pages 387-388, shows eight aliens denied admission under 2169, as follows: California, one; Louisiana, one; Montana, one; Oregon, one; Rhode Island, two; South Carolina, one; and Washington, one. At page 389:

"Only 8 applicants of all the various races who applied for citizenship were denied for the reason that they were held to be neither 'white persons' nor 'persons of African nativity or African descent,' *and therefore not eligible to become citizens of this country under the limitation provided in section 2169 of the United States Revised Statutes.* The figures given suggest the very comprehensive meaning, in the view of the courts, of the words above quoted from the statute." (Italics ours).

Report for 1916, pages 432-33-34, shows three denials under Revised Statutes, 2169, as follows: Hawaii, one; Pennsylvania, one; Washington, one.

Report for 1917, pages 479-80, shows fifteen denials under section 2169, as follows: California, three; Hawaii, one; Illinois, two; Montana, three; North Dakota, one; Oregon, one; Pennsylvania, two; Wisconsin, one; Wyoming, one.

Report for 1918, at pages 586-87, denials under section 2169 total twenty-six, segregated as follows:

California, four; Colorado, ten; Indiana, one; Montana, one; New Jersey, nine; Wyoming, one.

Report for 1919, at pages 756-57, denials under section 2169 total twenty-one as follows: Arkansas, two; Idaho, one; Indiana, four; Iowa, one; Montana, one; New York, four; Oregon, three; Washington, four; Wyoming, one.

Report for 1920, pages 771-72, denials under section 2169 total thirteen, as follows: California, one; Idaho, one; Illinois, one; Indiana, seven; Massachusetts, two; North Dakota, one.

We have found but one officially reported opinion of the Attorney General of the United States which touches upon this question since 1906, but this opinion, curiously enough, was given by former Attorney General Wickersham to the Secretary of Commerce and Labor under date of July 30, 1909 (27 Ops. Atty. Gen., p. 507). In that opinion Mr. Wickersham had occasion to consider the effect of section 1994 of the Revised Statutes as applied to a woman who had married a citizen of the United States in 1909. Section 1994 provides:

"Any woman who is now or may hereafter be married to a citizen of the United States, *and who might herself be lawfully naturalized,* shall be deemed a citizen." (Italics ours).

Attorney General Wickersham concluded that the only limitation imposed upon the right to be naturalized under this section was a racial limitation. In other words, the woman must be a free white per-

son within the contemplation of section 2169. This is apparent from the fact that after discussing various authorities, he said:

"The authorities above cited seem to settle the proposition that the words 'who might herself be lawfully naturalized,' in the Act of February 10, 1855, and section 1994 of the Revised Statutes, *refer to the class or race who might be lawfully naturalized,* and that compliance with the other conditions of the naturalization laws is not required." (Italics ours).

While this opinion does not expressly refer to the Act of 1906, it seems obvious that if the effect of that act was to abrogate racial disqualifications with respect to naturalization as is contended in the *Ozawa* brief, then the repeated references which are made in the opinion to section 2169 and to racial classes were entirely unnecessary. This opinion may perhaps furnish an explanation of the failure of the main brief of petitioners to expressly adopt the views stated in the *Ozawa* brief upon this subject.

4. Judicial Authorities.

We are unable to understand the basis of the statement made upon page 31 of the *Ozawa* brief that "the point that section 2169 does not restrict the Uniform Act of June 29, 1906, but is confined by its terms to Title XXX, has never been adjudicated at all," because a number of Federal courts have expressly passed upon the question adversely to petitioners, either directly or by way of dictum.

In *Bessho v. U. S.*, 178 Fed. 245, the court considered specifically only the effect of Revised Statute 2169 upon the act of July 26, 1894 (28 Stat. 124) relating to persons who had served in the Navy and held that the Act of 1894 was limited by 2169. The court, however, based its conclusion upon the fact that the Act of 1906 did not repeal Revised Statute 2169.

"By this legislation a new and complete system of naturalization was adopted, all the details of which, together with the method of procedure, and the courts having jurisdiction of it, were set forth and designated, and all acts or parts of acts inconsistent with or repugnant to its provisions were repealed. In section 26 of that act is found an express repeal of sections 2165, 2167, 2168 and 2173 of the Revised Statutes * * *. These repealed sections are all included in Title 30 of said Revised Statutes and demonstrate beyond doubt that the Congress carefully considered all of the provisions of that title and that it intended that the unrepealed sections thereof should still remain in force. Among those unrepealed is section 2169, which we thus find to be virtually reenacted, and declared to be one of the rules under which future naturalizations are to be conducted. * * *"

In re Alverto, 198 Fed. 688;
In re Rallos, 241 Fed. 686.

Held that the Act of 1906 did not expressly or by implication repeal Revised Statutes 2169.

In re Mallari, 239 Fed. 416, while differing from the cases last above cited with respect to the effect of section 30, Act of 1906, the court held that Revised Statutes 2169 was not repealed by the Act of 1906.

"The act of which section 30 forms part was obviously intended to cover fully the subject of naturalization. It repealed various sections of the Revised Statutes; but it did not repeal section 2169, which originally formed a part of the naturalization act of 1870, as amended in 1875, * * *. Until the passage of section 30, *supra*, only persons described in section 2169 could be naturalized."

In re Bantista, 245 Fed. 765.

"While we are of opinion that section 2169 of the Revised Statutes was not repealed by the Act of June 29, 1906, we think we have clearly shown by the proceedings in Congress that it was expressly amended by that act so as to admit to citizenship all persons not citizens who, owing 'permanent allegiance to the United States' and possessing the other qualifications provided by the statute, became residents of any state or organized territory of the United States. * * * It must, therefore, have been the purpose of Congress to so modify section 2169, R. S. as to admit to citizenship the Filipino * * *".

U. S. v. Balsara, 180 Fed. 694, 103 C. C. A. 660.

The language of this decision upon the construction of the statutes was dictum as it was not necessary to the conclusion reached, but is perhaps the best statement upon the subject.

"Counsel for certain Syrian interveners as *amici curiae* contend that the words 'free white persons' were used simply to exclude slaves and free negroes. If so, of course, all other aliens were included. This is enforced by the further argument that the Act of June 29, 1906, * * * repealed section 2169, Rev. St. U. S. by necessary implication, and that all aliens except those expressly excluded, like the Chinese, are now eligible to citizenship. The Act

of 1906 does provide for a uniform rule for the naturalization of aliens throughout the United States. Section 4, regulating proceedings, like section 2165, Rev. Stat. U. S., provides 'that an alien may be admitted to become a citizen of the United States in the following manner and not otherwise.' But section 2169, *supra,* limited the application of the whole title to persons being free white persons or of African race, and section 26, the repealing clause of the Act of 1906, makes no mention of section 2169. Of course, if the latter is inconsistent with or repugnant to the act, it is repealed, though not mentioned. *But we do not think it is. Indeed, the form annexed for declarations of intention requires the applicant to state his color, as well as his complexion. It seems to us incredible that Congress could have intended to make such a departure from existing law by implication merely."* (Italics ours).

In the case of *In re Geronimo Para,* 269 Fed. 643, the court had before it the question of whether a Japanese who had served in the military forces of the United States and therefore came within the seventh subdivision of section 4 of the Act of 1906, as amended by the Act of May 9, 1918, was entitled to be naturalized. The court answered the question in the negative, saying:

"The question is whether the words 'any alien,' appearing in the amended act of May 9, 1918, are broader than the words 'any alien' used in section 2166 of the Revised Statutes which I have above quoted. This last statute was passed upon by the Circuit Court of Appeals of the Fourth Circuit and by Judge Chatfield and Judge Hanford in the decisions I have cited, and the words 'any alien' were held to be limited, by section 2169 of the Revised Statutes, to white persons and aliens of African nativity and

to persons of African descent. It might well be held under the reasoning of these cases that section 2169 still limited the provisions of the Act of May 9, 1918, except so far as that act by expressly covering native-born Filipinos and Porto Ricans enlarged the former provisions *pro tanto,* even if section 2169 had not been referred to; but it seems clear that the words of section 2 of the Act of May 9, 1918, expressly providing that 'nothing in this act shall repeal or in any way enlarge section twenty-one hundred and sixty-nine of the Revised Statutes, except as specified in the seventh subdivision of this act and under the limitation therein defined,' were intended to preserve the definition of the classes of persons who could become citizens of the United States except certain Porto Ricans and Filipinos.

"The Naturalization Act of June 29, 1906, repealed sections 2165, 2167, 2168, and 2173 of the Revised Statutes, while it retained section 2169, defining the classes of aliens which may be naturalized. This section is expressly preserved and practically re-enacted by section 2 of the act of 1918. If the words 'any alien' are to be taken literally, not only would a meaning be given wholly contrary to existing judicial interpretation, but all the definitions of section 2169 would be rendered meaningless, and even Chinese who had served in the army could be naturalized, in spite of the express language to the contrary."

A similar conclusion was reached in the case of *In re En Sk Song,* 271 Fed. 23, in which case a native of Korea who was a subject of Japan and an honorably discharged soldier in the American Army was refused naturalization under the provisions of subdivision 7 of section 4 of the Act of 1906, as amended, purely upon racial grounds. Considering

the contention that section 2169 did not modify section 4 of the Act of 1906, as amended, the court said:

"By the Act of Congress of June 29, 1906 (34 Stat. 596), a pronounced departure in the matter of the procedure to be followed in naturalizing aliens was ordained. The action then taken was intended to provide 'for a uniform rule for the naturalization of aliens throughout the United States.' *U. S. v. Morena,* 245 U. S. 392, 38 Sup. Ct. 151, 62 L. Ed. 359. It was concerned with matters of procedure almost entirely. The requirements of the Revised Statutes providing for at least five years' residence in the United States, and for the making of the declaration of intention at least two years prior to the application for final citizenship papers (sec. 2165, R. S.) were substantially reincorporated into the new provisions. Section 2169, R. S. (Comp. St., sec. 4358), originally limiting the privileges of naturalization to 'free white persons,' and later to persons of African nativity or descent in addition (see *In re Singh* (D. C.) 257 Fed. 209, 210), was left intact.

"* * * Repeals by implication are not favored, and I am persuaded that, if nothing more were contained in the law than the subdivision 7 of the act of May 9, 1918, the privilege of naturalization would still have to be limited by the terms of section 2169. But Congress made assurance doubly sure, so to speak, by the provision above noted, contained in section 2 of the Act of May 9, and thereby expressly recognized and insisted upon, as a national declaration of policy, the continued and controlling efficacy of section 2169, except in the instance referred to, and that instance, I am persuaded, is the privilege then for the first time accorded to native-born Filipinos."

A similar conclusion was reached with respect to a Korean who had served in the United States

Army in the case of *Petition of Easurk Emsen Charr*, 273 Fed. 207. The court said, in part:

"The amendments made were not to the title as a whole, but primarily to section 4 of the Act of June 29, 1906, 34 Stat. 596. This section deals, not with persons eligible to become naturalized, but with the procedure to be taken and the showing to be made by those elsewhere defined to be eligible. This in itself is significant in its bearing upon the specific interpretation we are required to make.

"* * * Incidentally it has been urged that section 2169 was repealed, by implication, by the Act of June 29, 1906 (34 Stat. 596). The contention has uniformly been rejected, and, notably, in cases involving Filipinos. *In re Alverto,* (D. C.) 198 Fed. 688; *In re Rallos* (D. C.) 241 Fed. 686; *In re Lampitoe* (D. C.) 232 Fed. 382; *United States v. Balsara,* 180 Fed. 694, 103 C. C. A. 660.

"* * * The repealing section of the act of 1906 did not include section 2169, and the present act of 1918 expressly preserves it in force, 'except as specified in the seventh subdivision of this act and under the limitation therein defined."

In addition to these authorities which expressly consider the question, attention is directed to the fact that the lower Federal courts have in many cases subsequent to 1906 construed and applied section 2169 without expressly considering the effect of the Act of 1906. These cases, however, must be taken as authority of some weight, at least; otherwise there would have been no occasion for discussion with respect to section 2169.

II.

SECTION 2169 IS NOT A NULLITY.

Petitioners make substantially this argument, and it is virtually the only argument advanced in the main brief. It is said that in 1790, when the phrase "free white persons" was first used in the Act of March 26, 1790 (1 Stat. 103), the privilege of naturalization was intended thereby to be offered to all free white persons who were not black, and that consequently when the Act of July 14, 1870, (16 Stat. 254), extended the privilege to "aliens of African nativity and to persons of African descent," section 2169 "had no practical significance." This is but a diplomatic way of stating that Congress, when it inserted the phrase "free white persons" in the section by the Act of February 18, 1875 (18 Stat. 316) was indulging in a legislative action of a meaningless character. The extraordinary nature of this contention must at once be apparent to the court when it is remembered that it is a primary rule of statutory construction that courts are bound, if possible, to give to a statute a construction which will give it some force and effect rather than to import to the legislature the intention of enacting a meaningless measure.

As was said in the case of *Market Co. v. Hoffman,* 101 U. S., 112 (115):

"It is a cardinal rule of statutory construction that *significance* and effect shall, if possible, be accorded to every word. As early as in Bacon's

Abridgement, section 2, it was said 'that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or *insignificant*'." (Italics ours).

This quotation seems peculiarly pertinent in view of the position taken in petitioners' brief that section 2169 is now of no practical significance. See also, *Unity v. Burrage,* 103 U. S. 447, 457:

> Black on Interpretation of Law, 2d Ed., p. 154.
> 21 R. C. L. 1004.

We shall consider the question in the same manner in which the preceding proposition was discussed.

(1) Legislative History of Section 2169.

It is probably true that at the time of the passage of the Act of March 26, 1790, Congress did not have in mind the question of the naturalization of Asiatic aliens, although it is also probable that the possibility of naturalization of Indians was considered, because as early as 1827, Chancellor Kent in volume 2, page 72, of his Commentaries, in discussing this clause of the statute, says:

"The Act of Congress confines the description of aliens capable of naturalization to 'free white persons.' I presume this excludes the inhabitants of Africa, and their descendants; and it may become a question, to what extent persons of mixed blood are excluded, and what shades and degrees of mixture of color disqualify an alien from application for the benefits of the act of naturalization. Perhaps there might be difficulties also as to the copper-colored natives of America, *or the yellow or tawny races of the Asiatics,* and it may well be doubted whether any of

them are 'white persons' within the purview of the law." (Italics ours.)

The early Congressional debates throw little light upon the subject, and the phrase seems to have been carried through subsequent naturalization acts prior to 1870 without debate.

Act of January 29, 1795, 1 Stat. 414;
Act of April 14, 1802, 2 Stat. 153;
Act of March 22, 1816, 3 Stat. 258;
Act of May 26, 1824, 4 Stat. 69.

The Civil War resulted in the emancipation of the negroes and the consequent passage of the Act of July 14, 1870 (16 Stat. 254) which act extended the right of naturalization to persons of African nativity and descent. This act, however, did not repeal the limitations theretofore made by prior acts which required aliens to be free white persons. When this measure was pending before Congress, Senator Charles Sumner offered an amendment to strike the word "white" from the statute as it then existed so that all racial barriers would be eliminated, but the amendment was rejected through the efforts of certain Western senators who objected upon the ground that the striking of the word would authorize the naturalization of Asiatics. (Congressional Globe, 1869-70, Part 6, 5114-5125; 5148-5167; 5168-5177).

We quote the following excerpts from the debate which showed the current senatorial view at that time:

Mr. Tipton. "I wish to say that before this question is ever settled in this country Senators will have to meet the issue whether Christian civilization can be sacrificed or brought in dangerous competition with any system of paganism."

(Ibid, p. 5124.)

Senator Stewart of Nevada and Senator Williams of Oregon strenuously opposed the amendment of Senator Sumner as it would authorize naturalization of Chinese.

Mr. Stewart. "* * * The proposition of the Senator from Massachusetts (Mr. Sumner) is nothing more nor less than this: to extend naturalization to Chinese coolies. * * * They are pagans in religion, monarchists in theory and practice, and believe in their form of government, and no other, and look with utter contempt upon all modern forms as dangerous innovations; who believe in their monarchial form of government as they believe in their religion; who will sacrifice life for it; who will commit suicide for their devotion to their government and their religion. * * *."

(Ibid, p. 5150.)

Mr. Stewart. "* * * The negro was among us. * * * He was born here. He had a right to protection here. He had a right to ballot here. He was an American and a Christian, * * *. But how is it with these Asiatics? They have another civilization at war with ours; a language which we shall never understand—a language which is more arbitrary and difficult than any other spoken language."

(Ibid, p. 5152.)

Mr. Sherman. "Mr. President, the amendment offered by the Senator from Oregon raises the ques-

tion whether we shall ingraft Chinese in the naturalized population of the United States. The amendment offered by the Senator from Massachusetts raises the question *whether we shall adopt by our naturalization laws the whole pagan races of the world and ingraft them in our population* * * *". (Italics ours.)

(Ibid, p. 5152.)

Mr. Williams. "* * * Now sir, I ask every candid man in this body, does the Declaration of Independence mean that Chinese coolies, that the Bushmen of South Africa, that the Hottentots, the Digger Indians, heathen, pagan and cannibal, shall have equal political rights under this government with citizens of the United States.

* * * "Elements that will not coalesce with the other elements of our population and form together a national entity are dangerous to the peace and integrity of this nation. Mongolians, no matter how long they may stay in the United States, will never lose their identity as a peculiar and separate people. They never will amalgamate with persons of European descent; * * *."

"It is only necessary to refer to our own history to illustrate the truth of the remark. Look at the inevitable and disastrous results that have followed from the contact of the white race and the Indians upon this continent. No amalgamation has occurred or is possible; * * *."

(Ibid, p. 5155-5156.)

Mr. Thayer. "Will he permit the naturalization laws to be applied to the Indians, will he permit Indians to avail themselves of the naturalization laws?"

(Ibid, p. 5161.)

On pages 5164 and 5165 there is an interesting argument between Senators Trumbull, Tipton, Thurman and Saulsbury, on the question of whether a naturalization law which excludes persons because of color is a uniform law, Senator Trumbull holding such a law unconstitutional.

Mr. Trumbull. "I do hope that now the Senate will not act so inconsistently as to vote down this amendment. (Mr. Sumner's). * * * We have now by a distinct vote placed upon this bill a provision that any person of the African race or of African descent may be naturalized. We have struck the word 'white' out of the naturalization so far as it applies to the Hottentot, to the pagan from Africa. Now, it is proposed to deny the right to the Chinaman, * * *".

(Ibid, p. 5177.)

It will thus be seen that the unanimous legislative view of the times seems to have been that the phrase "white persons," as it then stood in the naturalization laws, operated to bar Asiatic races in general; otherwise there would have been no reason for Senator Sumner to have offered the amendment and no logical argument for the opponents thereto.

We appreciate the fact that perhaps it may be suggested that these statements should not be considered by the court under the rule announced in *Duplex Printing Press Co. v. Deering,* 254 U. S. 443, and cases cited. We have inserted them (1) for the reason that this is done upon pages 25 and 26 of the *Ozawa* brief with respect to another statute, and (2)

because the fact that such an amendment was offered and rejected with practically the unanimous view of all persons participating in the debate, that it would change the then existing statute, is proper to be considered in the same way that reports of Congressional committees or explanatory statements of committee members are resorted to. *Duplex Printing Press Co. v. Deering, supra.* That is to say, while the individual view of an individual legislator may not be material, the unanimous view of all participants in the debate upon an amendment which is rejected ought to be given as much weight as is the explanatory statement of the member of a committee.

In 1873 the Statutes of the United States were revised, and through an error the phrase "free white persons" was omitted from the first section of Title XXX, dealing with naturalization. Accordingly, in 1875, the Act of February 18, 1875 (18 Stat. 316), which was an act to correct errors and supply omissions in the Revised Statutes, contained a section which amended section 2169 so that it read as follows:

> "The provisions of this title shall apply to aliens, being free white persons, and to aliens of African nativity and to persons of African descent."

The Congressional Record showed that this bill was originally presented to the House by Representative Poland in behalf of the Committee on the Revision of the Laws of the United States. (3 Cong.

Record, Part 2, p. 1080.) Mr. Poland, in behalf of the committee, thus explained the purpose of the bill:

"The original naturalization laws only extended to free 'white' persons. That was the condition of the naturalization laws for a great many years. A very few years since, upon some bill, Mr. Sumner of Massachusetts, then in the Senate, moved to strike out the word 'white' from the naturalization laws, and it was objected to upon the ground that that would authorize the naturalization of this class of Asiatic immigrants that are so plentiful on the Pacific Coast. After considerable debate, instead of striking out the word 'white,' it was provided that the naturalization laws should extend to Africans and persons of African descent. Precisely what the view of the gentleman was who revised the naturalization laws, I am unable to determine. He has left out the word 'white' but has kept in the provision in relation to Africans and persons of African descent. The leaving out of the word 'white' would seem to leave the naturalization to extend to every species of alien, but that evidently was not the idea of the gentleman who revised that chapter, because he kept in the provision in relation to Africans and persons of African descent. We have proposed by this amendment to restore the law to just the condition in which it was before the revision was made." (3 Congressional Record, p. 1081.)

Mr. Willard of Vermont then moved that the law be permitted to stand as printed in the Revised Statutes, saying:

"I understand that the Committee on the Revision of the Laws do not make this recommendation upon the merits of the question at all, but simply upon the general principle upon which they are proceeding, to restore this revision as nearly as possible to the condition in which the law was at the time the re-

vision was passed. It occurs to me that there is no need of making this proposed correction of the revision of the laws, unless the House is thoroughly satisfied that the law as it now stands, with the word 'white' stricken out, is not a wise statute. I understand that members from California, and the Pacific Coast, make objection to the naturalization of Asiatics, more especially the Chinese. * * *"

This amendment was opposed by Mr. Page of California, who replied:

"I hope the amendment of the gentleman from Vermont (Mr. Willard) will not prevail. * * * All we ask is that the law be restored as it was prior to the change made by the committee. * * *

"I hope the change as reported from the Committee on the Revision of the Laws will be sustained. When this question was discussed in the Senate some three or four years ago, upon a motion of Mr. Sumner to strike out the word 'white' from the naturalization laws, the Pacific Coast Senators at that time prevailed upon him to consent to amend the naturalization laws so as to include persons of African descent, which would exclude Asiatics."

The speaker thereupon ruled that the amendment was out of order, to which ruling Representative Cox of New York, apparently a member of the Committee on Foreign Affairs, took exception in the following language:

"I naturally asked the question therefore whether there had not been some little carelessness in the revision of the laws by which the *whole of the Asiatic Malayan* race were allowed to come in here and be naturalized. That excited a good deal of attention in the country and especially on the Pacific Coast, and now when gentlemen have a chance to save our committee further trouble, when they can legis-

late on the word red or yellow, they escape the dilemma on a point of order, * * *." (Italics ours.)

(Ibid, 1082.)

From this resume it will be seen that the committee was of the opinion that the effect of the bill was to exclude Asiatics from the privileges of citizenship, an opinion which was apparently acquiesced in by all persons who participated in the debate. The statement made by Representative Poland in behalf of the committee who prepared the bill is clearly relevant. *(Duplex Printing Press Co. v. Deering, supra.)* While the statements of the other members are perhaps not strictly proper to be considered with respect to the meaning of the statute, the fact that the amendment was unsuccessfully sought to be stricken under a unanimous legislative view as to its effect, must be taken as constituting an implied acquiescence by Congress in the statement made by Mr. Poland for the committee.

(2) Executive Construction.

Little need be said with respect to executive construction. The adjudicated cases to which we shall hereinafter refer show that the various Federal executive departments who have been charged with the performance of duties under our naturalization statutes have since 1875 uniformly contended for a strict construction of section 2169 and they have not only opposed the naturalization of the Japanese (*In re*

Saito, 62 Fed. 126), but have also unsuccessfully opposed the naturalization of Hindoos (*In re Mohan Singh,* 257 Fed. 209), of Armenians (*In re Halladjian,* 174 Fed. 834) and Syrians (*Dow v. U. S.,* 226 Fed. 145), and other nationalities who may perhaps be on the border-line under a strict construction of the clause.

The officially reported reports of the Attorney General of the United States support the same conclusion. In an opinion given under date of June 15, 1894, to the Secretary of the Treasury, Attorney General Olney, in concluding that the Chinese were not entitled to be naturalized, said (21 Ops. Atty. Gen., p. 37):

"* * * It is sufficient for the present purpose to say that under section 2169, Revised Statutes, the privilege of naturalization is limited 'to aliens being free white persons and to aliens of African nativity and to persons of African descent'."

Similarly, in 1897, Attorney General McKenna, referring to section 2169, said (21 Ops. Atty. Gen., p. 582):

"It has been held that a native of China is not entitled to become a citizen of the United States under the Revised Statutes as amended in 1875 (*In re Ah Yup,* 5 Saw., 155; 21 Ops. 37)* * *."

(3) Judicial Construction.

Equal brevity with respect to judicial decisions in which section 2169 has been construed since 1875 may be observed. In some thirty cases, to which we

shall hereinafter refer in another connection, all the courts, both state and Federal, have construed section 2169 as prohibiting the naturalization of certain races upon racial grounds alone. They have differed as to the exact meaning of the phrase, and they have not agreed as to the status of particular races, but we have not found an adjudicated case, the decision in which has been officially reported, which dismissed the section as "having no practical significance," as does counsel for petitioners. The only case cited by petitioners in support of this construction is the decision of Judge Lowell in the case of *In re Halladjian,* 174 Fed. 834. We do not so read that decision. While the case contains an elaborate discussion of the meaning of the phrase "free white persons" in early days and concludes that probably it then did not include Asiatics, it concedes that historically and practically the clause has come to mean something different since that time, and Judge Lowell finally admitted petitioner, an Armenian, after expressly finding that Armenians were of Caucasian origin.

It may safely be said, therefore, that the executive department of the Government and practically all of the courts, both state and Federal, have for a period of approximately fifty years refused to follow the construction of the section which petitioners suggest. The court will also note that notwithstanding this uniform action by the judicial and executive departments of the Government, Congress has not only failed to amend the statute, but, upon the contrary,

in the Act of May 9, 1918, (40 Stat. 542) it has recognized the continued existence of the section in the repealing clause to that act found upon page 554 which provides that "nothing in this act shall repeal or in any way enlarge section twenty-one hundred and sixty-nine of the Revised Statutes, except as specified in the seventh subdivision of this act and under the limitation therein defined." It is a familiar rule that in cases of ambiguity, executive construction, when long continued, will be deemed almost conclusive upon the courts.

National Lead Co. v. U. S., 252 U. S. 140;
Jacobs v. Prichard, 223 U. S. 200;
Swigart v. Baker, 229 U. S. 187.

When to this is added the fact that such construction has been uniformly followed by all lower courts without contrary legislative action, it would seem that this court is almost bound to presume legislative acquiescence in such executive and judicial construction.

However, even if we consider this question as an original proposition, the same result must ensue. The Act of 1870 expressly admitted aliens of African nativity or descent, and thereby, if petitioners' construction be adopted, made of no significance the phrase "free white persons," as used in section 1 of the Act of April 14, 1802 (2 Stat. 153), which was the existing naturalization statute in 1870. Under such construction, therefore, the so-called error in the

revision of 1873 by which the phrase was dropped from section 2165 of those Revised Statutes, was, in fact, no error and the amendment of 1875 a useless performance. The fallacy of this argument is conclusively demonstrated by the legislative history of the section to which we have referred.

Indeed, no serious argument is advanced by petitioners in support of this construction other than one of expediency. It is said that the phrase is difficult to interpret, that the courts are not in accord as to its meaning which has resulted in inequality in application, and from these alleged facts the court is asked to judicially repeal the section in order that Congress may, by appropriate legislation, and perchance at the risk of international complications, make its meaning more specific. The statement that the section has led to inequalities is not borne out by the decisions. The courts have had some academic differences with respect to the ethnology of certain races, like the Hindoos and Syrians, but it will be found that they have quite generally resolved all doubts in favor of the alien. It may be safely said, we think, that no race has been rejected that ought properly to be admitted, and that, upon the contrary, we have possibly been too liberal in this respect. The fact that current judicial construction may academically be subject to scientific criticism constitutes no serious objection to the continued application of the construction. We have operated quite successfully for fifty years under a uniform construction of the

section which imports to it some meaning, and it has served to protect considerable sections upon the Pacific slope from the possible domination of Asiatic races. No serious reason is advanced by petitioners why that course should now be abandoned other than to allay the criticism of scholars, a reason entirely insufficient to justify this court in now convicting Congress of enacting meaningless legislation.

The suggestion is made that if this construction be adopted by the court Congress may further amend the statute if it is not satisfied with that construction. Since this suggestion is one of expediency, it may be answered in kind. If the classification which now obtains is not sufficiently definite, then there is no practical classification which can be used other than to specifically designate certain nationalities by name. We think that we need not dwell upon the dangerous possibilities from an international standpoint of any attempt by Congress to expressly designate certain nationalities by name in a statute of this character. There is quite a considerable difference between the mere construction and application of a statute passed fifty years ago and the enactment of a new statute which might be taken by members of other races as proclaiming to the world their alleged inferiority and unfitness to participate in the benefits of American citizenship.

III.

THE JAPANESE ARE NOT FREE WHITE PERSONS WITHIN THE CONTEMPLATION OF SECTION 2169.

Assuming that the court should refuse to hold section 2169 to be "of no significance," there still remains the general question of whether petitioners, who are natives of Japan, are free white persons within the contemplation of the section. This inquiry involves (1) the proper construction of the section, and (2) the status of the Japanese when the statute is construed.

(1) The Proper Construction of the Statute.

The first court which had occasion to consider the section was Circuit Judge Sawyer in the case of *In re Ah Yup,* 1 Fed. Cas. No. 104, decided in 1878, in which it was held that members of the Chinese race were not free white persons within the contemplation of section 2169. Judge Sawyer held in that case that the words "white person" intended to include "a person of the Caucasian race," and he found that it was not used "in a sense so comprehensive as to include a person of the Mongolian race." Accordingly, he denied the petition of a Chinaman to be naturalized. In 1880, Circuit Judge Deady of Oregon, in the case of *In re Camille,* 6 Fed. 256, decided that a Canadian Indian could not be naturalized for the reason that the phrase "free white person" included only members of the Caucasian race. In 1894 Circuit

Judge Colt of the District Court of Massachusetts, in the case of *In re Saito,* 62 Fed. 126, construed the section as "intended to exclude from the privilege of citizenship all alien races except the Caucasian." He accordingly concluded that since a native of Japan was not a Caucasian he was not entitled to be naturalized.

The same construction was adopted by District Judge Morrow in 1895 in the case of *In re Gee Hop,* 71 Fed. 274, in which the petition of a Chinaman was denied. In 1889 the supreme court of Utah, in the case of *In re Nian,* 21 Pac. 993, held an Hawaiian ineligible, stating that section 2169 "authorizes the naturalization of aliens of the Caucasian or white races and of the African races only, and all other races, among which are the Hawaiians, are excluded." In 1897 District Judge Maxey of the Texas court admitted a Mexican to citizenship in a somewhat elaborate opinion which appears to be based largely upon questions of policy and certain treaty provisions of then existing treaties between Mexico and the United States. *In re Rodriguez,* 81 Fed. 337. He did not deny the general correctness of the test applied by Judge Sawyer, in the *Ah Yup* case, but simply held that in so far as Mexicans were concerned the letter of the statute need not be applied for reasons not here material. In 1902 the supreme court of Washington, in the case of *In re Yamashita,* 30 Wash. 234, 70 Pac. 482, refused to grant a license to practice law to a Japanese under a statute which restricted the

right to practice law to American citizens, although the Japanese in question had sought to be naturalized by a court of original jurisdiction. In discussing the meaning of the section that court said (p. 237):

"When the naturalization law was enacted the word 'white' applied to race, commonly referred to the Caucasian race."

The same conclusion was reached by District Judge Hanford in 1908 in the case of *In re Kumagai,* 163 Fed. 922, where a Japanese in all other respects properly qualified, was held to be not entitled to be naturalized. In 1909 District Judge Chatfield, in *In re Knight,* 171 Fed 299, held that under the section "persons of the Mongolian race, either Chinese or Japanese, cannot be naturalized." In the same year Circuit Judge Lacombe, in the case of *In re Balsara,* 171 Fed. 294, accepted the Caucasian theory and admitted a Parsee to citizenship, although he suggested that possibly a *stricter* limitation ought to obtain. In the same year the case of *In re Halladjian,* 174 Fed. 834, was decided by Circuit Judge Lowell, a case which is quoted from quite extensively by petitioners. That case involved the right of certain Armenians to be naturalized. The opinion is voluminous and seems to indicate some doubt in the mind of the court as to the proper test to be applied, although the court offers no substitute for the racial test. In any event, the court found Armenians to be Caucasians, saying: "Armenians have always been ruled as Caucasians and white persons," so that the

decision cannot be cited as repudiating the Caucasian test, although it criticizes it.

In 1909 District Judge Newman in *In re Najour,* 174 Fed. 735, admitted a Syrian upon the express grounds that Syrians were members of the Caucasian race. Similarly in 1910 the Circuit Court of Appeals of the Fourth Circuit, in the case of *Bessho v. U. S.,* 178 Fed. 245, held a Japanese not to be eligible, holding that Mongolians were excluded. Judge Lowell, in *In re Mudarri,* 176 Fed. 465, decided in 1910, admitted a Syrian to citizenship upon the ground that he was a Caucasian, although again expressing his dissatisfaction at the uncertainty in the statute.

Similarly, in 1910, District Judge Wolverton, in *In re Ellis,* 179 Fed. 1002, upon the admission of the government that Syrians were members of the Caucasian race, admitted a Syrian to citizenship, refusing to adopt the contention of the government that section 2169 should be restricted to those persons who belonged to the European races. In *United States v. Balsara,* 180 Fed. 694, decided by the Circuit Court of Appeals of the Second Circuit in 1910 affirming 171 Fed. 294, the court adopted the same test, and having found the Parsees to be Caucasians, admitted one to citizenship. It was said in the decision:

"We think that the words refer to race and include all persons of the white race, as distinguished from the black, red, yellow, or brown races, which differ in so many respects from it. Whether there

is any pure white race and what peoples belong to it may involve nice discriminations, but for practical purposes there is no difficulty in saying that the Chinese, Japanese, and Malays and the American Indians do not belong to the white race."

In 1912 Judge Thompson in the case of *In re Alverto,* 198 Fed. 688, accepted the racial test and denied naturalization to a Filipino. In *In re Young,* 195 Fed. 645, Judge Hanford, following the same authorities, refused to naturalize a German whose mother was a Japanese. This case was afterwards retried by District Judge Cushman in the case of *In re Young,* 198 Fed. 715, where the same conclusion was adopted. In 1913 District Judge Rudkin, in the case of *In re Mozumdar,* 207 Fed. 115, admitted a high caste Hindoo, finding him to be of the Caucasian race, at the same time stating:

"But, whatever the original intent may have been, it is now settled, by the great weight of authority, at least, that it was the intention of Congress to confer the privilege of naturalization upon members of the Caucasian race only."

These authorities constitute substantially all of the reported decisions, at least of the Federal court, between 1875 and 1913, a period of some thirty-eight years. Up to this time all of the courts had adopted and applied the so-called Caucasian test, although Judge Lowell criticized it from a practical standpoint. The influx of immigrants from western Asia, however, seems to have induced the Government to contend for a stricter construction, as appears from

the opinions in the cases of *In re Najour, In re Mudarri* and *In re Halladjian,* where it was considered by the Government that the privilege should be further restricted to those persons who were not only of Caucasian, but also of European origin. This effort of the Government seems to have been unsuccessful until the case of *Ex parte Shahid,* 205 Fed. 812 and *In re Dow,* 211 Fed. 486, 213 Fed. 355, decided by Judge Smith in 1913 and 1914. In the *Shahid* case the court dismissed the petitioner, a Syrian, for naturalization, upon personal grounds, but by way of dictum took occasion to hold that section 2169 included such persons only as were understood in 1790 to be of "European habitancy and descent." This dictum was thereafter made the grounds of decision in the *Dow* case, where the petition of a Syrian, in all other respects properly qualified, was denied solely upon racial grounds. The *Dow* case, however, was subsequently reversed by the Court of Appeals of the Fourth Circuit in *United States v. Dow,* 226 Fed. 145, in which case the court refused to adopt the test followed by Judge Smith and applied the so-called Caucasian test.

In 1917, District Judge Dickinson, in the case of *In re Sadar Bhagwab Singh,* 246 Fed. 496, refused to naturalize a Hindoo, although he found him to be a member of the Caucasian race. In this case he adopted what he designated as the historical interpretation of the phrase. The reasoning of the decision is somewhat obscure, but in substance he re-

futes both the Caucasian test and inquiries made by ethnologists, and construes the phrase "subject to changing conditions" as having the meaning adopted by people generally. This decision does not seem to have been followed by any other court. In 1919, District Judge Bledsoe in *In re Mohan Singh,* 257 Fed. 209, admitted a Hindoo to citizenship. Discussing section 2169, he said:

"With the march of time and growth of knowledge, ethnologically and otherwise, however, it may be inferred, I think, that Congress, in its successive re-enactments of the language, has re-enacted it with its enlarged meaning in mind; and the conclusion of the Circuit Court of Appeals of the Second Circuit, * * * to the effect that 'Congress intended by the words, "free white persons", to confer the privilege of naturalization upon members of the white or Caucasian race only' seems reasonable and just.

"Modern ethnologists use the term 'white' and 'Caucasian' synonymously and interchangeably."

The same conclusion was adopted with respect to Hindoos by District Judge Wolverton in the case of *In re Thind,* 268 Fed. 683, decided in 1920. District Judge Hand, in the case of *In re Narasaki,* 269 Fed. 643, decided in 1919, held a Japanese not to be entitled to be naturalized. In the case of *In re Song,* 271 Fed. 23, decided in 1921, it was held that a Korean was not a white person within the contemplation of the act. In *In re Charr,* 273 Fed. 207, decided by District Judge Van Valkenburgh in 1921, a similar conclusion was reached with respect to Koreans. In construing the statute, it was said:

"The meaning of section 2169 has become so far clarified by late judicial decisions that we are confronted by no embarrassment in determining the question of color in so far as that controls. * * * In accordance with numerous holdings the term includes, as commonly understood, all European races and those Caucasians belonging to the races around the Mediterranean Sea, whether they are considered fair white or dark whites, and though certain of the eastern and southern European races are technically classified as of Mongolian or Tartar origin. Generally speaking, 'free white persons' includes members of the white or Caucasian race as distinct from the black, red, yellow and brown races."

In *Porterfield v. Webb,* 279 Fed. 114, decided December 19, 1921, District Judge Dooling, in an opinion which was concurred in by Circuit Judge Hunt and District Judge Bledsoe, said:

"This limitation excludes three of the great races of the world, the yellow, the brown and the red. And while such exclusion is in a sense arbitrary, it is not without foundation in reason, and has been in effect, except for a brief period, practically during the existence of our government."

Similarly, in *Terrace v. Thompson,* 274 Fed. 841, decided in 1921, District Judge Cushman, in considering the validity of the Washington alien land law, held that a Japanese was not a white person within the contemplation of section 2169. This opinion was concurred in by Circuit Judge Gilbert and District Judge Neterer.

The foregoing authorities represent substantially all of the cases in which the lower Federal courts

have had occasion to construe section 2169 since the passage of the Act of 1875. We have cited thirty decisions. No court has ever adopted the construction contended for by petitioners, i. e., that the section now has no practical significance. Twenty-eight courts have held that section 2169 restricts the right of naturalization to those aliens who are members of races generally regarded as Caucasian, either by direct scientific inquiry, or by centuries of assimilation, which constitutes a substantial equivalent thereto. One court has restricted the scope of the section still further by limiting the clause to the European races; still another has further imposed the limitation of construing the phrase after including those persons generally regarded as white persons. If either of the two latter tests be applied, the petitioners must obviously fail, since the Japanese are not a European race, and neither are they at the present time generally regarded as members of the white race. There remains then the question of whether the Japanese may properly be regarded as Caucasian, either ethnologically or by assimilation and historical recognition. The unanimous verdict of the courts is to the contrary.

2. The Status of the Japanese.

There remains then the question of whether the Japanese can be considered to be persons of the Caucasian race. If they cannot be so considered, the writ should be denied.

a. Judicial Authorities.

The cases upon this subject have already been considered in connection with the general construction of the section. We have found no adjudicated case in which it has been held that a Japanese is a free white person within the statute. The following decisions either directly or by way of dictum have held the contrary:

In re Saito, 62 Fed. 126;
In re Kumagai, 163 Fed. 922;
In re Knight, 171 Fed. 299;
Bessho v. United States, 178 Fed. 245;
In re Young, 195 Fed. 645, 198 Fed. 715;
In re Ozawa, 4 Hawaii Dist. 643;
Terrace v. Thompson, 274 Fed. 841;
Porterfield v. Webb, 279 Fed. 114;
In re Narasaki, 269 Fed. 643.

b. Scientific Authorities.

We are somewhat in doubt as to the position which counsel for petitioners takes upon this phase of the case. In the *Ozawa* brief the position is taken that the Japanese are free white persons of Caucasian origin, even if we accept the controlling judicial construction of the section. Petitioners' main brief, upon the other hand, seems to abandon this theory and to concede that the Japanese are probably primarily of Mongolian origin, a race always classified as the yellow race as distinguished from the white or Caucasian race (Petitioners' Brief, pp.

20 and 21). We assume that it is intended to present both views in the alternative.

While it is perhaps true that the origin of the Japanese race has never been definitely established by ethnologists, it is also true that they are quite generally agreed that the Japanese race proper is not of white or Caucasian root-stock, notwithstanding the quotations in the *Ozawa* brief from the unpublished letters and addresses of one David Munro. Speaking generally, it may be said that the scientists have reached the conclusion that the islands of Japan were originally inhabited by a race of aborigines known as the Ainos, whose origin is practically unknown but who appear to have had many of the physical characteristics of the Caucasians. They are also agreed that at a somewhat prehistoric age these islands were invaded by the ancestors of the present Japanese, who appear to have been in part Mongolian and in part Maylay. After centuries of warfare the Ainos, like the American Indian, have been generally exterminated, so that in 1906 it was said by Professor Baelz, a professor of the Imperial Japanese University from 1876 to 1902, that there were then in Japan not over 17,000 remaining survivors of this race.

Smithsonian Institute Reports, 1907, p. 526.

The overwhelming consensus of scientific opinion, however, is that there is a great difference between the Ainos and the Japanese; for instance, Pro-

fessor Baelz states that the Ainos will soon disappear as a race "because they will be gradually absorbed by the Japanese." Likewise, Professor Katsuro Hara, of the Kyoto Imperial University, in his Introduction to the History of Japan, in discussing the Ainos says (p. 30):

"The only thing virtually agreed to by all investigators engaged in ethnological inquiry concerning Japan, is that the Ainu is the aboriginal stock, and that the Japanese so-called belongs to a stock different from the Ainu."

The following excerpts illustrate the result of scientific investigation up to the present time:

Encyclopaedia Brittannia (1910) 11th Edition:

Under title "Ethnology" divides mankind into three primary divisions: Caucasic, Mongolic and Negroid, and specifically includes Japanese under Mongolic division.

Under the title "Japan", it is said that the Japanese race is made up of (1) Ainos; (2) Manchu-Koreans; (3) Monguls, and (4) Malays. Regarding the Ainos, says:

"These people—the Ainu—are usually spoken of as the aborigines of Japan. They once occupied the whole country, but were gradually driven northward by the Manchu-Koreans and the Malays, until only a mere handful of them survived in the northern island of Yezo. * * * The Ainu suggests much closer affinity with Europeans than does any other of the types. * * * It is not to be supposed, however, that these traces of different elements indicate any lack of homogeniety in the Japanese race.

Amalgamation has been completely effected in the course of long centuries, and even the Ainu, though the small surviving remnant of them now live apart, have left a trace upon their conquerors."

Encyclopaedia Americana (1920) p. 549:

Under title "Ethnology" outlines the following enthnographic scheme: European, or white; African-Negro, or black; Asiatic-Mongolian or yellow; American or coppery and Oceanic or dark.

Regarding the Mongolian race (p. 552) it says:

"The Asian, or Mongolian race, is made up of two divisions—the Sinitic and Sibiric. * * * The Sibiric branch of this race is largely located north of the mountains of Central Asia ranging with the Arctic circle from the Pacific to the Atlantic Ocean. * * * The Japanese and Koreans constitute the Japanese group."

Under the title "Japan" at page 628, Shogoro Tsuboi, professor of ethnology in the Imperial University, Tokyo, speaks of a prehistoric people called by the later Ainus "Koropokguru" from which the Eskimos and Aleuts sprang, and continues:

"* * * The Japanese language is closely related to Korean. In Japanese manners and customs some likeness to those of Korea and Malay are found. It is quite probable that the Ainu, Malay and continental elements are the chief, though not necessarily, the only, constituents of the Japanese."

Nelson's Loose-leaf Encyclopaedia, under title "Japan", at page 567, says:

"Although with regard to civilization, Japan has made great and substantial progress, the Jap-

anese are nevertheless still an Asiatic nation. *Language and anthropology show that the predominant element in the Japanese race is Mongol.*"

New International Encyclopaedia (1915) p. 584, under title "Japan-Ethnology", says:

"The largest factor in the production of the Japanese is to be traced back to the Mongolian race of the adjacent continent, a view confirmed by the physical characteristics of a considerable portion of the population at the present time. * * * There are recognizable three physical types—an Ainu type, chiefly characteristic of North Japan; a Manchu-Korean in the regions nearest Korea; and a Malayo-Mongolic in the center and east. The Korean-Manchu type seems to go back, like the primitive Chinese, to a Mongolian ancestry with a strain of proto-Caucasian blood, while the Ainus are perhaps allied to the most primitive Caucasians; but such opinions must be accepted with caution."

Deniker, "The Races of Man," (1901) pp. 371-372:

Divides Asia into five races: (1) Dravidian; (2) Assyroid; (3) Indo-Afghan; (4) Ainu and (5) Mongolian. Geographically speaking, he says Northern Asia is composed of (1) Yaniseians or Tubas; (2) Palaesiatics and (3) Tunguses. The Palaesiatics, he says, include the Ainus, and he does not specify that they were "white." He says:

"The Ainus who are classed among the Palaesiatics, inhabit the north and east of the island of Yezo, the south of Saghalien, and the most southern islands of the Kuriles. They form a group by themselves, differing from all other peoples of Asia. Their elongated heads, their prominent superciliary

ridges, the development of the pilous system, the form of the nose, give to them some resemblance to the Russians, the Todas and the Australians, but other characters (coloration of the skin, prominent cheek-bones, short stature, frequent occurrence of the *os japonicum*, etc.) distinguish them from these peoples and affords grounds for classing them as a separate race. * * * It is calculated that there are about 18,500 Ainus (of whom 1,300 are in the island of Saghalien) at the present time; their number at Yezo has remained stationary for several years. * * * Their religion is pure animism. * * * The Ainus, like most Asiatic peoples, such as the Giliaks, Tunguses, etc., have a special veneration for the bear. * * * The Ainu language is agglutinative, and has no analogy with any known language."

At page 387 this author says:

"The fine types of Japanese which may be chiefly observed in the upper classes of society, is characterized by a tall slim figure, a relative dolichocephaly, elongated face, straight eyes in the men, more or less oblique and Mongoloid in the women, thin, convex or straight nose, etc. The coarse type common to the mass of the people is marked with the following characters: a thickset body, rounded skull, broad face with prominent cheek bones, slightly oblique eyes, flattish nose, wide mouth.

"These two types have been the result of crossings between Mongol sub-races and Indonesian or even Polynesian elements. The influence of the Ainu blood is shown only in Northern Nippon."

Bettany, "The World's Inhabitants," 3rd Ed. (1892) p. 384, says:

"Japan includes the flower of the Mongolian people. * * * We can look back to a period when tribes resembling the remaining Ainos of Yezo, inhabited such parts of the islands as were redeemed

from forests. They were gradually driven northwards by the ancestors of the present Japanese. That these were in part of Chinese origin cannot be doubted; but how far the Manchus, Coreans, Malays and Papuans may have a claim to share in the Japanese ancestry, cannot be settled."

"Dictionary of Races or Peoples" (Report of Immigration Committee, Senate Doc. 662, 61st Cong., 3rd Session):

Adopts Blumenbach's classification of mankind into five races. The primary classification, it is pointed out, is physical or somatological, and the treatise then proceeds to subdivide each race into groups based on linguistic differences, saying:

"The practical arguments for adopting such a classification are unanswerable."

It then by means of a table shows how the anthropologists and ethnologists have divided the races:

Brinton divides mankind into five races, and includes Japanese and Korean under the Sibiric branch of the Mongolian.

Keane makes four classifications, combining the Malay and Mongolian as one.

Blumenbach makes the five commonly used divisions.

Deniker on the other hand had twenty-nine classifications.

Huxley's divisions were Negroid, Australoid, Melanchroid, Xanthrochroid and Mongoloid.

At page 85 this work says:

"With the exception of the 'Arctic group,' the Japanese and Koreans form the eastermost group of the great Sibiric branch, which with the Sinitic branch (Chinese, etc.,) constitutes the Mongolian race. As was said in the article on Chinese, the Japanese and Koreans stand much nearer than the Chinese, especially in language, to the Finns, Magyars and Turks of Europe. The language of all these peoples belongs to the aggultinative family, while Chinese is monosyllabic. Although many people may mistake a Japanese face for Chinese, the Mongolian traits are much less pronounced. The skin is much less yellow, the eyes less oblique. The hair, however, is true Mongolian, black and round in section, and the nose is small. These physical differences no doubt indicate that the Japanese are of mixed origin. In the South there is probably a later Malay admixture. In some respects their early culture resembles that of the Philippines of today. Then there is an undoubted white strain in Japan. The Ainos, the earliest inhabitants of Japan, are one of the most truly Caucasian like people in appearance in Eastern Asia. They have dwindled away to less than 20,000 under the pressure of the Mongolian invasion from the mainland, but they have left their impress upon the Japanese race."

Article by Captain F. Brinkley entitled "Primeval Japan," in Annual Report of Smithsonian Institute, year ending June 30, 1903:

"The student must be content to regard the annals of primeval Japan as an assemblage of heterogeneous fragments from the traditions of South Sea Islanders, of Central Asian tribes, of Manchurian Tartars and of Siberian savages, who reached her shores at various epochs * * *.

"The first were the Koro-pok-guru or cave men. The second were the Ainu, a flat-faced, heavy-jawed, hirsute people who completely drove out their predecessors and took possession. The Ainu of that period had much in common with animals. They burrowed in the ground for shelter; they recognized no distinctions of sex in apparel or of consanguinity in intercourse; they clad themselves in skins; they drank blood; they practiced cannibalism. * * * They * * * unceasingly resisted the civilized immigrants who subsequently reached the islands, they were driven northward by degrees and finally pushed across the Tsugaru Strait into the Island of Yezo. The long struggle, and the disasters and sufferings it entailed, radically changed the nature of the Ainu. They became timid, gentle, submissive folk; lost most of the faculties essential to a survival in the racial contest, and dwindled to a mere remnant of semi-savages, incapable of progress, indifferent to improvement, and presenting a more and more vivid contrast to the energetic, intelligent and ambitious Japanese.

"But these Japanese—why were they originally? Whence did the three or more tides of immigration set which ultimately coalesced to form the race now standing at the head of Oriental peoples * * *? Kampfer persuaded himself that the primeval Japanese were a section of the builders of the Tower of Babel. Hyde-Clark identified them with the Turano-Africans who traveled eastward through Egypt, China and Japan. Macleod recognized in them one of the lost tribes of Israel. Several writers have regarded them as Malayan colonists. Griffis was content to think that they are modern Ainu and recent scholars incline to the belief that they belonged to the Tartar-Mongolian stock of Central Asia.

"The theory which seems to fit the facts best is that the Japanese are compounded of elements from Central and Southern Asia. * * * The Asiatic

colonists arrived via Korea. But they were neither Korean nor Chinese. * * * Their birthplace was somewhere in the north of Central Asia. As for the South Asian immigrants, they were drifted to Japan by a strange current called the 'black tide' which sweeps northward from the Philippines."

Dr. E. T. Hamy in an article entitled "The Yellow Races," appearing at page 505, Smithsonian Reports (1895), says:

"The Koreans and Japanese belong without contradiction, at least up to a certain point, to the great mass of peoples of the yellow race. * * * It can hereafter no longer be doubted that the population is connected by bonds of kinship with its neighbors on the yellow continent. * * * The Malays, whose fleets ravaged the coasts of Tsiampa as late as the eighth century * * * have left behind numerous traces of their intervention.

"One last national element, which has remained very modest in its influence, because it was driven out, with a kind of repugnance, by the Japanese is the Ainu, the hairy race of Kuriles, of Sakhalin and of Yezo. I have told you what little I know of these singular islanders, whom for the moment I am utterly unable to classify. The Ainos are, on the average, akin to the Chinese by their cephalic index, and I have provisionally placed them between the Chinese and the Eskimo." (Italics ours.)

An article by Dr. E. Baelz, professor of Imperial University, Tokyo, entitled "Prehistoric Japan," appearing in Smithsonian Reports (1907) is enlightening. This author distinguished in Japan three essential elements: (1) the north or true Mongolian; (2) the south or Malayan and (3) the Aino, and adds:

"Probably there is an admixture of Hindu or foreign blood in many Malays."

He vigorously combats the doctrine that the Japanese are widely different from the Chinese, saying:

"Investigators were too much influenced by outward appearances, especially by dress and methods of wearing the hair. * * * To contradict this I have the testimony of any number of Japanese and Koreans that they themselves cannot distinguish one from the other if costume and hairdressing are the same. * * * Therefore I cannot understand how Donitz can say 'the Japanese are so different at first sight from the Mongolians who inhabit the neighboring mainland that it is hard to conceive how there could be any direct connection between them.'"

Regarding the Ainos this author says:

"They will soon disappear as a race, not, however, because they will be stamped out by encroaching civilization, but because they will be gradually absorbed by the Japanese. Intermarriage is now of almost daily occurrence. * * * The Japanese type generally prevails among these halfbreeds."

A number of historical writers are of more than passing interest. K. C. Latourette, in "The Development of Japan" (1918) p. 18:

"The Japanese of today are a mixed race, and are the result of the coalescence of several migrations. * * * The Manchu-Korean and Malay stocks predominate, with the balance in favor of the latter, but there are as well traces of infusion of other blood, part of it Mongol, part of it still undetermined. Some enthusiasts have even seriously claimed to have found an Indo-European admixture. In language the Japanese more nearly resemble some

of the groups of northern and central Asia, and especially Korea, but there are also likenesses to the Malay tongues."

"An Introduction to the History of Japan," by Katsuro Hara, (1920) says:

"Who are the Japanese? We are almost at a loss to decide to which assertion we can most agreeably give out countenance without the risk of receiving an immediate setback. So I shall be content to state here only those hypotheses, which may be considered safe, although they may not rise above the level of conjecture."

He leaves in doubt the question as to the origin of the Ainu, saying:

"Even the supposition that the Ainu belongs to the Aryan stock cannot be rejected as quite a worthless speculation."

Continuing, he says:

"We have here designated the vanquishers of the Ainu by the name of Japanese. * * * If it is most probable that the Japanese is a heterogeneous race, then what are the elements which constitute it? * * * Summing up I cannot but think that the prehistoric immigrants into our country from the South were by no means a negligible factor in constituting the island nation, though the majority of immigrants might have come from the nearest continental shores, and in this majority it is not necessary to exclude the Chinese altogether."

"A History of Japan," by James Murdock (1910), page 35, says:

"The inhabitants of the Luchus, of Satsuma and the rest of the Southern Kyusku and the peoples of

the old Hans in Korea are, or were, of the same stock —either Malay or Indonesian. And just as the people of the three Hans supplied the basic element in the Korean language, so those of Luchu and Kyushu have furnished the element in the tongue of modern Japan. Furthermore they have furnished Japan with her Imperial house and with the greater part of her aristocracy and ruling caste."

He then points to the presence of another class of inhabitants in the state of Idzumo, presumably from the continent, and of Mongolian origin, and continues:

"The combination of this branch of Kyushu, Kumaso and the Idzumo men proved irresistible; they pushed their conquests to eastward along both shores of the inland sea and ultimately established a strong central state in Yamato at the expense of the Ainu."

Brinkley's "Japan" (1904) at page 70, says:

"By the Japanese themselves it is stoutly affirmed that not the smallest mark of consanquinity can be traced between them and the Ainu or Yezo tribe. Unquestionably the languages of the two have nothing in common and so far as outward appearance is concerned the dissimilarity is conspicuous. Nevertheless, certain German anthropologists have placed on record their opinion that the Ainu are Mongolian."

Brinkley then proceeds to disprove this and says:

"We may accept it as an established fact that the Japanese and the Ainu have no affinity whatever."

He proceeds:

"Western ethnologists are tolerably agreed that Jimmu (first emperor) *and his followers were Mongolian.* There have been attempts to identify them with the lost tribes of Israel; with the Aztecs and with other peoples of the Occident. In Japan there is a belief that they were Manchurians; that is to say, a race which originally emigrated from a remote part of India, a race distinct from the Chinese, of which some settled in Manchuria, spread thence to the northeast China and finally passed to Japan. It must be agreed for the moment to leave the problem partially unsolved; noting, however, that though the Japanese Shizoku cannot be absolutely identified with the Mongolian of today, the differences are not so great as to be incapable of reference to the modifying influences of environment acting through long centuries. At all events we may conclude that the final immigrants, Jimmu and his followers of the so-called Takana-no-para folk, found on their arrival a Malayan people inhabiting the southern and central parts of Japan, and an arctic tribe, the Ainu, living in the north, and that while they amalgamated with the former, they drove out the latter, treating them as a wholly inferior race, the result being that whereas the Japanese proper show plainly enough the blending of the Mongolian and Malayan types, they show no affinity whatever with the Ainu." (Italics ours.)

"A Handbook of Modern Japan," by E. W. Clement, (1904), at page 44, says:

"It is well known that the Japanese are classed under the Mongolian (or yellow) race. They themselves boastfully assert that they belong to the 'golden race,' and are superior to Caucasians who belong to the 'silver race'! As Mongolians they are marked, not only by a yellowish hue, of many shades from the darkest to the lightest, but also by straight black

hair (rather coarse), scanty beard, rather broad and prominent cheek bones, and eyes more or less oblique. Some think that the Japanese people show strong evidence of Malay origin, and claim that the present Emperor, for instance, is of a striking Malay type. It is not impossible that Malays were borne in the 'Japan Current' northward from their tropical abodes to the Japanese islands; but there is no historical record of such movement. Therefore the best authorities like Rein and Baelz, do not acknowledge more than slight traces of Malay influence." (Italic ours.)

At page 45 of this work is found the following note:

"'Various Impressions' is the title of an address delivered at a meeting of the Imperial Society by Dr. Nitobe. * * * Dr. Nitobe gave an account of his travels in the South Pacific. He visited Java, many other islands, and Australia. At Java he felt persuaded that an eminent French ethnologist, who not long ago said that, as the result of much investigation, he had come to the conclusion that the Japanese race was 6/10 Malay, 3/10 Mongolian and 1/10 mixed, was right. Among the mixed element there was an Aryan element which came from India and a negrito element. 'During my travels in the South Pacific Islands I was repeatedly struck by the similarity of Malay customs to our own. In the structure of their houses even this was very manifest. * * *'"

"The Japan Year Book," 1913-14, printed in English at Yokahama, at page 13, says:

"The origin of the Japanese is obscure * * *. The following are the principal theories advanced:

"1. That the Japanese owe a good deal of their composition to the Ainu, the aborigines of Japan, who

originally entered the country from the mainland of Siberia. This theory has now been practically abandoned, in view of the researches of Baelz, Aston, Batchelor and others.

"2. That the Japanese are originally of Malay stock.

"3. That the Japanese are a mixture of Tartar-Mongolian races from Central and Southern Asia, a theory supported by Brinkley, Griffis, Max von Brandt and others.

"4. That the Japanese are purely Mongols. This theory emanates from Baelz and Rein, and is supported by Chamberlain.

"5. That the Japanese are a mixture of a Caucasian, Negrito, Mongolian and Semitic, the negrito elements being originally found in Japan previous to the immigration from the mainland of Asia, in which all authorities believe. This theory is based on the researches of Monro.

"The sum of all the above theories is that the Japanese race consists of a mixture of races all Asiatic in origin, and that therefore the Japanese are an Asiatic race.

"Recently a Russian student has advanced the theory that the Japanese have in part blood of the Ugrian stock, and are similar to the Finns and certain namadic tribes of North and Central Russia. Savoff, the author of this theory, bases his belief principally on the evidence of language."

At page 15 it is said:

"The Ainus are a distinct race from the Japanese, and there has been, comparatively speaking, little intermarriage between the two races.

"Undoubtedly they are a dying race, and the years cannot be many before they will be entirely wiped from the face of the earth. For the present they are mostly interesting as the remains of a purely barbaric race."

"The Japanese Nation," a noted and widely quoted work by Inazo Nitobe (1912) says, in part:

"There seems as yet little philological affinity established between the continental peoples and the Japanese. In this respect a relationship with the Malay race promises to be closer, though as yet no definite conclusion is reached.

"But before the Malays or the Chinese reached the shore of Japan, a hairy race of northern blood, large in numbers, and known as the Ainu, seem to have held the entire country in possession."

He then dwells upon the conflict of authority as to the exact origin of the Japanese, concluding:

"Suppose we could obtain an average for the present generation, so unstable are human types—as Boas, Bolk and other ethnographers have demonstrated—that a few generations hence will show a marked difference in Japanese anatomy. * * * It has long been and probably still is, no easy task to assign a definite place to the Japanese in the general scheme of ethnic classification. We used to be dumped into the heap of linguistic non-conformists, under the name of Turanian. * * * The Japanese, as they are, according to the carefully compiled table of Professor Amos W. Butler, belong to what he calls the Sibiric branch of the Asiatic race, and with the Koreans constitute the Japanic stock, quite apart from the Chinese, Mongolic and the Tartaric. Perhaps this classification is the most precise."

This author means the Sibiric branch of the Mongolian race as distinguished from the Sinitic branch to which the Chinese, Mongols and Tartars belong.

He says further:

"Philologically Japanese is a forlorn and solitary orphan, that can claim no relationship either lateral or collateral, with any other language."

Basing his remarks upon researches by Baelz, Professor David Murray, in "The Story of Japan" (Famous Nations) at page 29, says the Ainos belong to the northern group of Mongolians who inhabit the regions about Kamtschatka and adjacent parts of Siberia. He says the later Japanese belong to two distinct immigrations, the earlier one to the province of Izumo from Korea, belonging to a rougher and more barbarous tribe of the Mongolian race, and the later one to the island of Kyusku, either from Korea or through Formosa or the Ryuku islands. The second immigration came from a more cultured tribe of the Mongolian race, although there is some probability that they were of Malay origin. The author takes the view that both immigrations were of Mongolians, saying:

"That they came from the same race is evident from their understanding of the same language, and having habits and methods of government which were not a surprise to the newcomers, and in which they readily cooperated."

As the court will observe from the resume made in the "Japan Year Book of 1913," the only reputable authority who ascribes Caucasian origin to the Japanese is Monro, and even he appears to concede the existence of marked Mongolian and Malay strains. Mr. Monro's speculations will be found set forth quite extensively upon pages 58 to 67 of the *Ozawa* brief. They find little or no support in any of the standard authorities but are based almost entirely upon sim-

ilarity in language with the Polynesians and certain prehistoric ruins.

However, for the purpose of this action it is not necessary for the court to definitely pass upon the correctness of the theories of Dr. Monro or any of the other scientists. Whatever may have been the origin of the Japanese in prehistoric times, they have for a period of over 2,000 years constituted a homogeneous race which has been regarded as yellow or Mongol by all the European races since we first had any knowledge of the existence of Japan. The debates in Congress to which we have referred clearly indicate an attempt to exclude the Asiatics or yellow races. Popular opinion has always followed that view, and it has been further supported for the past fifty years by an almost unbroken line of judicial authorities. Since the problem before the court is one of statutory construction and not of scientific inquiry, it is submitted that that view should be adopted, especially when it finds support in at least the numerical weight of scientific authority.

IV.

THE JAPANESE ARE NOT ASSIMILABLE.

Beginning upon page 67 of the *Ozawa* brief under the head "The Japanese Are Assimilable," there is found a discussion of the legislative policy of admitting the Japanese to citizenship and a tribute to the virtues of the members of that race. Since the question is merely one of statutory interpretation and

not of legislative expediency, we are somewhat in doubt as to whether we may, with propriety, discuss this question. Since, however, the discussion is invited by petitioners, and the decision in the case is of the gravest importance to the citizens who reside upon the Pacific Coast and in the Territory of Hawaii, we feel that we should not permit this statement to go unchallenged. The conclusion of counsel upon this point is based upon certain statistics relating to crime taken from the Report of the Governor of Hawaii to the Secretary of the Interior in 1916 and an unpublished paper said to have been written by one M. M. Scott, the principal of a high school in the city of Honolulu. This argument, we think, is based upon an entire misconception of the question or of the things which are necessary in order to permit assimilation between persons of different races. The assimilability of a foreign race is not established by demonstrating their theoretical fitness for citizenship because the problem is a practical one which cannot be solved by applying rules of morality. The very virtues which are referred to in the brief as characteristic of the Japanese race, such as their industry and economic efficiency, are a not inconsiderable factor in the prevention of any successful assimilation when added to the racial difference between the Japanese and the citizens of this country. As was well said by Professor Robert E. Park of the University of Chicago in his Introduction to "The Japanese Invasion," by J. F. Steiner:

"It has been assumed that the prejudice which blinds the people of one race to the virtues of another, and leads them to exaggerate that other's faults, is in the nature of a misunderstanding which further knowledge will dispel. This is so far from true that it would be more exact to say that our racial misunderstandings are merely the expression of our racial antipathies. Behind these antipathies are deep-seated, vital, and instinctive impulses. These antipathies represent collision of invisible forces, the clash of interests, dimly felt but not yet clearly perceived. They are present in every situation where the fundamental interests of races and peoples are not yet regulated by some law, custom, or any other *modus vivendi* which commands the assent and the mutual support of both parties. We hate people because we fear them; because our interests, as we understand them at any rate, run counter to theirs."

The same author in an article entitled "Racial Assimilation in Secondary Groups," American Journal. Soc., March, 1914, p. 610, said:

"The chief obstacles to the assimilation of the Negro and the Oriental are not mental but physical traits. It is not because the Negro and the Japanese are so differently constituted that they do not assimilate. If they were given an opportunity the Japanese are quite as capable as the Italians, the Armenians, or the Slavs of acquiring our culture and sharing our national ideals. The trouble is not with the Japanese mind but with the Japanese skin. The Jap is not the right color. The fact that the Japanese bears in his features a distinctive racial hall mark, that he wears, so to speak, a racial uniform, classifies him. He cannot become a mere individual indistinguishable in the cosmopolitan mass of the population, as is true, for example, of the Irish and to a lesser extent of some of the other immigrant races.

The Japanese, like the Negro, is condemned to remain among us an abstraction, a symbol, and a symbol not merely of his own race but of the Orient and of that vague, ill-defined menace we sometimes refer to as the 'Yellow Peril.' This not only determines to a very large extent the attitude of the whole world toward the yellow man, but it determines the attitude of the yellow man to the white. It puts between the races the invisible but very real gulf of self-consciousness."

Mr. J. F. Steiner, in his work entitled "The Japanese Invasion," which is quite sympathetic towards the Japanese, in chapter 10 reaches the conclusion that there can never be a true assimilation so long as the present physical difference exists between the Caucasian and the Japanese, saying (p. 180):

"It is not a question whether their physical characteristics are attractive or repulsive to Americans. The problem is not lessened by the fact that the color of the Japanese is hardly more pronounced than is that of the people of southern Europe. Even when due allowance is made for their changes in physical appearance brought about by their reaction to their new environment—changes in the cast of countenance and in the peculiar mannerisms which play an important part in intensifying racial distinctions—the fundamental fact still remains that their physical type marks them out as Orientals wherever they are, and suggests to us all the undesirable connotations that are bound up with the word 'Asiatics'."

We might multiply authorities to establish the proposition that there can be no real assimilation of an alien race unless it is accompanied by a social assimilation which destroys the marked physical char-

acteristics which differentiate races. It is unnecessary to do so, because the judicial knowledge of the court with respect to the problem of the Negro, of the Indian and the Chinaman in the United States will sufficiently demonstrate this fact.

Social assimilation can only be accomplished by inter-marriage, since that is the only way in which the physical characteristics which create a racial prejudice can be obviated. Few authorities, even those most favorable to the Japanese, are willing to admit the possibility of any general inter-marriage between the Japanese and the Caucasian race. As early as 1892 Herbert Spencer, in a private letter written to Baron Keneko, which was first made public in the *London Times* of January 22, 1904, said:

"To your remaining question respecting the intermarriage of foreigners and Japanese, my reply is that, as rationally answered, there is no difficulty at all. It should be positively forbidden. It is not at root a question of social philosophy. It is at root a question of biology. There is abundant proof, alike furnished by the intermarriages of human races and by the interbreeding of animals, that when the varieties mingled diverge beyond a certain slight degree *the result is inevitably* a bad one in the long run. I have myself been in the habit of looking at the evidence bearing on this matter for many years past, and my conviction is based on numerous facts derived from numerous sources. * * * By all means, therefore, peremptorily interdict marriages of Japanese with foreigners."

Lawton, in Volume 2, page 761, in his work on "Empires of the Far East," reaches the same conclusion, stating:

"For it is indisputable that the marriage of a western woman to a Japanese lowers her status in society and exposes her to the indignities that are inseparable from the operation of the Japanese social system."

Even Dr. Gulick, for many years an ardent advocate of the virtues of the Japanese, in his book "The American Japanese Problem," states:

"It may be set down as a universal rule that intermarriage of races should follow, not precede, social assimilation."

The court will find that subject quite thoroughly considered by Mr. Steiner in chapter 4 of his work entitled "The Japanese Invasion."

Reference might likewise be made to the report of the hearings held before the House Committee on Immigration and Naturalization with respect to the Japanese problem held on the Pacific Coast in July, 1920, where even the Japanese admitted the practical impossibility, at least at the present time, of any general intermarriage between the races, although they insisted that there were no biological objections.

Without intermarriage there can be no social assimilation, and without social assimilation there can be no real assimilation. The refusal of a numerically dominant race to socially assimilate with an alien population must inevitably prevent the latter race from ever becoming assimilated, because assimilation is an evolutionary and educational process which can never be accomplished without mutual cooperation

between the races. This is more particularly true in cases where the alien race is of high mentality for the reason that they are not content to accept a subordinate status with which a partial assimilation may somtimes be accomplished.

It is no reflection upon the Japanese to say that they will never be assimilated until socially recognized. Refused social recognition, it is inevitable that they will continue to be Japanese in thought and action, and that they will not accept American ideas or recognize substantial obligations to the American Government, because the human mind generally determines abstract things by concrete facts. Whoever may be at fault, therefore, the fact cannot be successfully controverted that the Japanese have not, in fact, been assimilated, and that if social recognition be required as a condition precedent, they will probably never be assimilated. The hearings before the House Committee, *supra,* demonstrate this quite conclusively. These hearings show the general consensus of the mass of the people who come in contact with large numbers of the Japanese to regard them purely as Asiatics, and not as Americans, either actual or potential. It is true that many witnesses, notably educators and clergymen, criticize this attitude, while others think that the Japanese are economically necessary to the development of our agricultural resources. Scarcely any were found, however, who denied the inescapable fact that a social and racial gulf exists between the two races which has steadily in-

creased in proportion to the increase in our Japanese population. It is unnecessary for us to analyze the testimony of those who oppose the further immigration of the Japanese or to determine whether their apprehensions were justified in fact. The court will find those conclusions set forth in the report of the committee. In the final analysis, the problem is a practical one which cannot be answered by assuming all men to be perfect. The granting of political equality, while desirable in the case of a race capable of assimilation, in the case of a race not so capable, simply intensifies the problem. The history of the South after the right of suffrage was conferred upon the negro is ample proof of this fact. Facts are stubborn and unescapable, and they are not met by showing that from the standpoint of morality they should not exist. It is unnecessary for us here to attempt to apportion the blame for this prejudice, because the fact would remain the same, even though we should absolve the Japanese from all responsibility. If the decision of the case should turn upon the possibility of the successful assimilation of the Japanese, the writ should be denied, because the Japanese will never be assimilated in this country, at least in our generation.

We do not mean by the foregoing to admit that there is no real objection to Japanese assimilation other than racial prejudice and economic jealousy upon the part of the whites. The hearings had before the House Committee revealed many other factors which might be worthy of serious consideration

by a legislative body. We feel, however, that we have gone as far as is proper in this respect, indeed even farther than we would otherwise have done had the point not been suggested in the *Ozawa* brief.

The argument is also made that it would be presumed that the superior court of Pierce county found these petitioners to be Ainos, and therefore of the Caucasian race when it naturalized them. There are three answers to this contention: (1) the pleadings admit the petitioners to be Japanese, and Ainos have always been recognized as a different race than the Japanese, although owing allegiance to that nation, (2) the origin of the Ainos has never been established, and since they owe allegiance to the Japanese, their status must be considered the same, and (3) the record does not include the order of naturalization made by the superior court of Pierce county, and since that judgment was declared void by the highest court of the state, if there is any presumption it must be in support of the conclusion of the latter court where the record is incomplete.

The judgment should be affirmed.

Respectfully submitted,

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Attorney General of Washington,
Attorney for Respondent.

E. W. ANDERSON,
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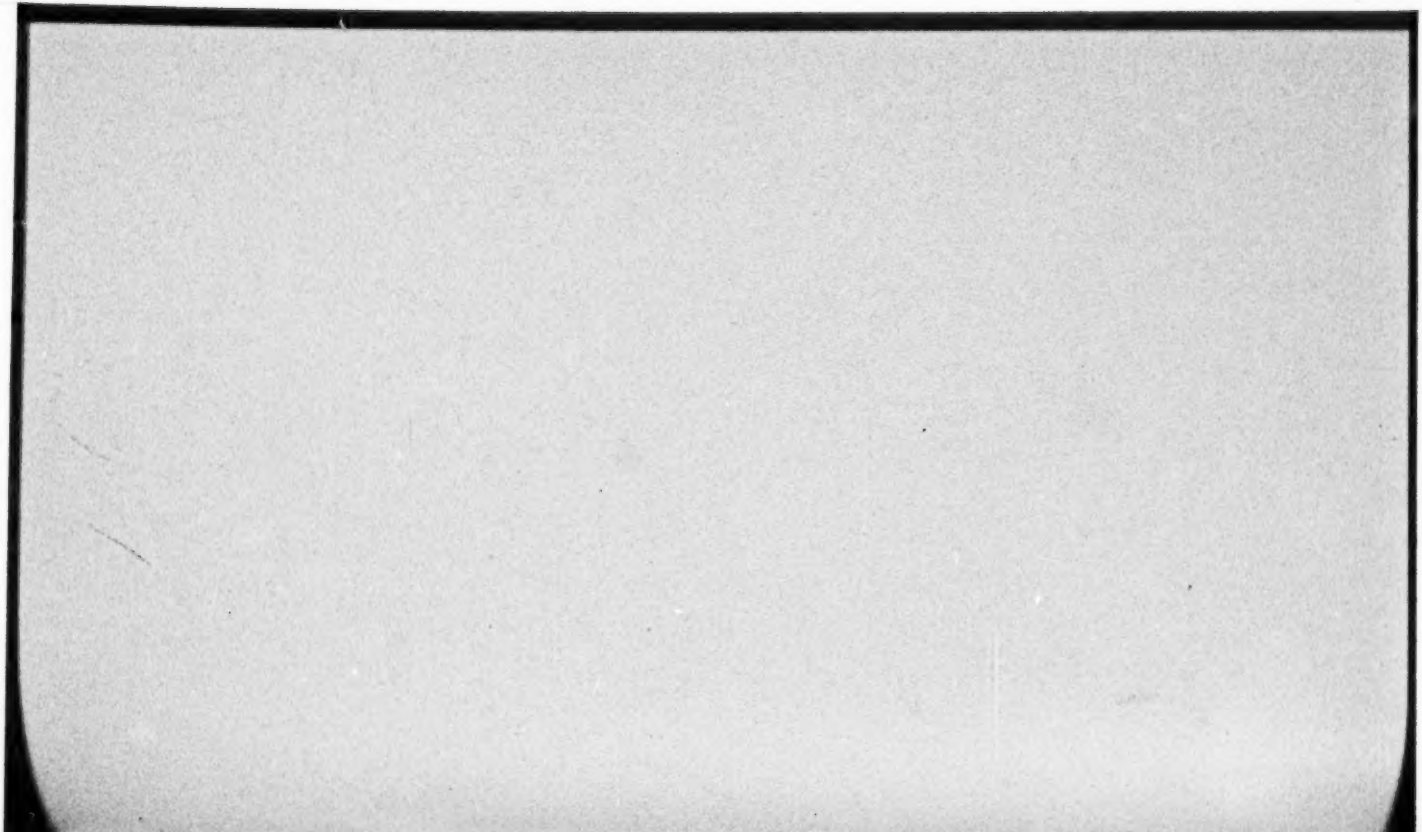

SUPREME COURT OF THE UNITED STATES.

No. 177.—October Term, 1922.

Takuji Yamashita and Charles Hio Kono, Petitioners, *vs.* J. Grant Hinkle, as Secretary of State of the State of Washington.	On Writ of Certiorari to the Supreme Court of the State of Washington.

[November 13, 1922.]

Mr. Justice Sutherland delivered the opinion of the Court.

This case presents one of the questions involved in the case of *Takao Ozawa* v. *The United States*, this day decided, viz.: Are the petitioners, being persons of the Japanese race born in Japan, entitled to naturalization under Section 2169 of the Revised Statutes of the United States?

Certificates of naturalization were issued to both petitioners by a Superior Court of the State of Washington prior to 1906, when Section 2169 is conceded to have been in full force and effect.

The respondent, as Secretary of State of the State of Washington, refused to receive and file Articles of Incorporation of the Japanese Real Estate Holding Company, executed by petitioners, upon the ground that, being of the Japanese race, they were not at the time of their naturalization and never had been entitled to naturalization under the laws of the United States and were therefore not qualified under the laws of the State of Washington to form the corporation proposed, or to file articles naming them as sole trustees of said corporation. Thereupon petitioners applied to the Supreme Court of the State for a writ of mandamus to compel respondent to receive and file the Articles of Incorporation, but that court refused and petitioners bring the case here by writ of certiorari.

Upon the authority of *Takao Ozawa* v. *The United States, supra*, we must hold that the petitioners were not eligible to naturalization,

and as this ineligibility appeared upon the face of the judgment of the Superior Court, admitting petitioners to citizenship, that court was without jurisdiction and its judgment was void. *In re Gee Hop,* 71 Fed. Rep. 274; *In re Yamashita,* 30 Wash. 234.

The judgment of the Supreme Court of the State of Washington is therefore

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.